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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

BONNIE MCELRATH,
Plaintiff,

v.

FISH RITE, INC., an Oregon
Corporation, JAMIE DORSEY, SR.,
AND BARBARA DORSEY,
Defendants.

Case No. CV-08-1159-KI

RESPONSE SHOWING WHY
CASE SHOULD NOT BE
DISMISSED FOR WANT OF
PROSECUTION

A. The Schedule

On April 28 and April 29, 2009, the Court entered a scheduling order as
follows:

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1. Status report on discovery issues due 5-12-09.
2. Status conference set for 5-15-09.
3. Discovery complete by 9-15-09.
4. Joint Alternate Dispute Resolution report due 10-15-09.
5. Pretrial order and/or dispositive motions due 10-15-09.
6. Pretrial documents due 1-8-10, 1-15-10, and 1-22-10.
7. Pretrial conference 2-1-10.
8. Three-day trial 2-10-10.

B. What Has Been Accomplished and What Is Yet to Be Done.

The status reports and Court conferences took place. Documents have been produced and interrogatories answered. Because of scheduling difficulties, the parties were not able to take depositions prior to close of discovery but they have agreed to take the key depositions on November 19 and 20, which will be done.

Attorney Merten is not in a position to recommend a settlement or trial value to plaintiff until those depositions are taken. Plaintiff is willing to mediate the case prior to Christmas.

Attorney Merten sees no need for a pretrial order, but will prepare his part of it expeditiously if the court orders that one be prepared.

Attorney Merten has no trials scheduled prior to this case and is prepared to meet all remaining pretrial deadlines.

1 C. Summary of the Progress of the Case¹.

2 On April 10, 2009 plaintiff suggested that depositions of the parties and
3 a key witness be taken the week of May 11. Thereafter, counsel for the parties
4 had discovery disputes which caused a delay in setting the depositions. Most
5 of those were resolved by counsel, with the one remaining dispute presented to
6 the Court on May 15. On May 21, the Court resolved that dispute.
7

8 At that point, forward progress on this case slowed. On the one hand,
9 plaintiff's counsel was deeply involved in a major personal injury case against
10 an ambulance service that had been scheduled for trial in early June in
11 Multnomah County. The defendants then changed counsel and were
12 successful in postponing that trial until late August, but at the same time
13 flooded plaintiff's firm with motions and depositions. That trial did not
14 conclude until September 10. Thereafter, plaintiff's counsel negotiated four
15 similar cases against the same defendants which were settled on October 6.
16

17 On the other hand plaintiff's counsel did not want to take depositions in
18 this case until the defendants produced outstanding documents.² The records
19 were not produced until November because counsel for both sides had a
20 misunderstanding about a protective order. On October 6, attorney Merten
21
22

23 ¹ Attached as Ex. A, pg. 1-22 are emails from the Court and both counsel which track the
24 progress of the case in full.

25 ² Those documents were tax returns, orders for Fish Rite's products, and attendance records of
26 Fish Rite employees. Both sides had already produced numerous records and answered
interrogatories.

reminded Mr. Charter that he had not yet received the required discovery documents, and that a pretrial order was due on October 15, unless waived. Attorney Merten proposed waiving the PTO. Mr. Charter responded on October 7 that he was awaiting a protective order by Mr. Merten before producing the documents and that he did not want to waive a PTO but was willing to “defer it until after the holidays.”³

Mr. Charter had earlier offered to produce the tax documents “once I have an agreed Protective Order from Mr. Merten.”⁴ Attorney Merten did not think that meant he was to prepare the protective order because he was not seeking one.⁵

Attorney Merten in good faith believes that a meaningful PTO cannot be formulated without first taking the scheduled depositions.

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³ Attorney Merten had understood from the May 15 conference with the Court that Mr. Charter was willing to waive a PTO.

⁴ 5-15-09 email.

⁵ Mr. Charter also wanted a protective order for the product orders plaintiff requested, but the Court did not require one when it ordered them produced.

1 D. Conclusion.

2 The parties have not met two deadlines – filing of a pretrial order and
 3 alternate dispute resolution statement.⁶ Plaintiff requests trial without a
 4 pretrial order, but will do her part if the Court requires a PTO. Plaintiff will
 5 participate in preparing a PTO and in private mediation once the depositions
 6 are taken. All other dates will be met. Plaintiff requests that the case not be
 7 dismissed.
 8

9 Dated: November 13, 2009

11 /s/ Charles J. Merten

12 Charles J. Merten, OSB #630582
 13 Attorney for Plaintiff

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 26 ⁶ The parties have actually agreed to take depositions beyond the discovery disclosure date.